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Mr. Chairman, members of the committee, thank you for the opportunity to testify today on AB 403.

As you know, under current law, municipalities and counties are authorized to grant variances from the terms of a zoning ordinance. Variances can be granted for a use that is not consistent with the zoning ordinance or for an inconsistency in setbacks, dimensions, frontage, or density otherwise known as an "area" variance. The governing board must find four things apply in order to grant a variance:

1. The variance will not be contrary to the public interest
2. Substantial justice will be done by granting the variance
3. The variance is needed so that the spirit of the ordinance is observed.
4. Due to special conditions, a literal enforcement of the provisions of the zoning ordinance will result in unnecessary hardship.

Under AB 403, municipalities and counties are able to enact an ordinance creating an expiration date for a variance. This bill does say though that if there is no ordinance creating an expiration date of the variance, that the granted variance does not expire unless an expiration date is given at the time the variance is granted. This bill also codifies case law by ensuring that variances run with the land.

AB 403 is a common sense consumer protection that sets a structure for the granting of variances that will ensure that the governing boards and the property owners will be on the same page and will have all of the pertinent facts upon the issuance of a variance.

Thanks again for the opportunity to testify, I'm asking for your support in moving this bill forward in order to get it before the full Assembly.



Memorandum

To: All Legislators
From: Tom Larson, Vice President of Legal and Public Affairs
Date: December 11, 2011
Re: AB 403/SB 300 -- Expiration of Variances

The Wisconsin REALTORS® Association (WRA) supports AB 403/SB 300 which codifies current case law regarding when local zoning variances expire. Specifically, AB 403/SB 300 clarifies that variances from local zoning ordinances run with the land and do not expire unless expressly stated by the local municipality on or before the date the variance was granted.

Variances are important land-use tools used by municipalities to grant relief to property owners on a case-by-case basis when current local zoning regulations place unreasonable restrictions on the ability of such property owners to use and enjoy their property. For example, if a property owner wants to construct a deck or add an additional bathroom on the back of his/her house and the current zoning ordinance prohibits such an improvement, the municipality will often grant a variance and allow the deck or bathroom to be constructed under certain conditions. This practice allows property owners, whose lifestyles require more modern conveniences, to update their older homes rather than being forced to move to newer homes.

Current Wisconsin case law recognizes that variances run with the land and are not specific licenses to a particular property owner. See Goldberg v. City of Milwaukee Board of Zoning Appeals, 115 Wis. 2d 517, 523 (1983). Moreover, according to the leading authority on zoning and planning law, the general rule of law is that a zoning variance does not expire as long as the circumstances warranting the variance have not changed. See Rathkopf, *The Law of Zoning & Planning* § 58.24. The underlying rationale for allowing variances to exist without expiration is that the purpose of a variance is to allow a property owner to make reasonable use of his or her property and, thus, a variance should not expire unless the circumstances affecting the property have changed so that the property can be used in the desired without the variance. *Id.*

Some local communities, however, are not aware of the law and recently attempted to repeal variances because they were not used by the property owner to whom they were granted. While the issues were eventually resolved, the current property owner has had to incur significant frustration, delays, and legal expenses in order to resolve these issues. This confusion has created problems for property owners, lenders, and others involved in real estate transactions.

To avoid further confusion, AB 403/SB 300 attempts to codify current Wisconsin case law by stating that a variance from a local zoning ordinance does not expire unless (a) the municipality granting the variances has expressly established an expiration date for variances by ordinance, or (b) the local board of appeals/adjustment that granted the variance establishes an expiration date at the time the variance was granted.



Department of Administration
Intergovernmental Relations Division

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Mayor

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**Comments on Assembly Bill 403 and Senate Bill 300:
Relating to the length of time for which a variance applies.
Assembly Committee on Urban and Local Affairs
February 29, 2012**

The City of Milwaukee authorizes numerous variances each year through our Board of Zoning Appeals (BOZA). Assembly Bill 403 and Senate Bill 300 are very useful to us in one important sense. Until now, it has been an open question as to whether a zoning tribunal possesses the authority to even set a term limit on variances in light of the holding in the Goldberg case (referenced in the analysis to the bill) to the effect that variances "run with the land." The City has taken the position that this holding applies only to changes in the identity of the owner or tenant to whom the variance is issued, i.e. that if such a change occurs, the variance would inure to the new owner or tenant as a matter of right, but that it did not preclude BOZA from fixing an expiration date for the variance itself. This view, however, has not been confirmed by any published decision, and could conceivably be challenged by a property owner claiming that a variance should be permanent once granted and that BOZA lacked authority to limit its duration.

What this bill does is to resolve that issue by confirming that the governing body of a city or county exercising zoning authority has the power to fix terms and expiration dates of variances granted by their respective zoning tribunals. This is a very positive development because it clarifies the scope of the Goldberg case, in the same direction as the City and BOZA have been applying that case since it was issued in 1983. Specifically, it confirms that the "runs with the land" ruling within Goldberg does not apply to the duration of the variance, since the preceding sentence reaffirms the authority of both the Common Council and BOZA to set limits upon that duration.

Flexibility in the crafting of variances, and most especially, use variances, is essential. We support the bill's premise that enactment of an ordinance specifying the duration of variances is discretionary and not mandatory. The Common Council need not enact any such ordinance and BOZA may continue to fix term limits on variances on a case-by-case basis, as it does now. We also do not have any concern over the retroactivity clause, since we will simply continue current and prior practice in this area.

We do, however, have one suggestion: to extend SB-300 to special use permits. The way it is drafted, it excludes "special exceptions" referenced in Wis. Stat. sec. 62.23(7)(e)7 from the language, which indicates differential treatment of special use permits and variances. In order to avoid any ambiguity or future litigation on this matter, we seek clarification that special use permits are to be treated in the same manner as variances and thus must not in all cases be permanent.

For further information, please contact:
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